

D.P.U. 92-DS-11

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by D.W. White Construction, Incorporated.

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APPEARANCES: Donald W. White  
James Miller  
D.W. White Construction, Inc.  
867 Middle Road  
Acushnet, Massachusetts 02743  
Respondent

Gail Soares, Dig-Safe Investigator  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
Boston, Massachusetts 02202

FOR: THE DIVISION OF PIPELINE  
ENGINEERING AND SAFETY

## I. INTRODUCTION

On September 2, 1992, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to D.W. White Construction, Incorporated ("D.W. White or Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on July 29, 1992 on Andover Street at Cross Street in Peabody, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification to underground utility operators and failed to exercise reasonable precaution which resulted in damage to an underground gas service line operated by Boston Gas Company ("Boston Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on September 22, 1992, or send a written reply to the Department by that date.

On September 21, 1992, pursuant to 220 C.M.R. § 99.06 (1), the Respondent submitted a written response disputing the allegations in the NOPV. In a letter dated October 5, 1992, the Respondent was informed of the Divisions determination that it had violated the Dig-Safe Law and informed it of the right to request an adjudicatory hearing.

On October 14, 1992, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07 (3). After due notice, an adjudicatory hearing was held on January 10, 1994, pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Gail Soares, a Dig Safe investigator, represented the Division. James Giles, a special representative for Boston Gas testified on behalf of the Division. The Division presented

six exhibits. Donald W. White, treasurer of D.W. White Construction, Inc. and James Miller, construction foreman for D.W. White, testified on behalf of the Respondent. The Respondent offered three photographs into evidence. The Department moved all exhibits into evidence.

## II. SUMMARY OF FACTS

### A. The Division's Position

The Division alleges that the Respondent did not maintain Dig-Safe markings and failed to use reasonable precautions while excavating on Andover Street at Cross Street in Peabody, Massachusetts, which resulted in damage to a 4-inch plastic gas main operated by Boston Gas (Tr. at 6; Exh. D-1). With respect to the first allegation, the Division offered two underground damage reports that were prepared by Company employees, indicating that the gas markings were not visible at the time of the damage (Tr. at 10, 13; Exh. D-1).

Mr. Giles testified that the Respondent received a valid Dig-Safe number on April 27, 1992, the area was marked by Boston Gas, and there was no request for a re-marking of the site where the damage occurred on July 29, 1992 (Tr. at 8, 11).

With respect to the second allegation, the Division asserts that the respondent should have used hand-digging to expose the pipeline to determine its location before excavation (id. at 21). The Division claims that instead, the Respondent used a bulldozer for excavation which caused the damage to the pipeline (Exh. D-1).

### B. The Respondent's Position

Mr. Miller testified that the Respondent had not left the area any time between April 27, 1992 and July 29, 1992, and that the markings were visible and clear (Tr. at 19, 44). The

Respondent stated that the markings were visible on the grass surface at the site of the damage, and there were visible markings on the pavement on both sides of the grass (id. at 19, 41, 47).

Mr. White stated that the gas pipe was damaged by a bulldozer (id. at 28). He testified that there were two test holes dug approximately 100 feet apart which indicated that the pipe was at least 30 inches deep (id. at 31). Mr. Miller testified that the damage occurred 40 feet from one test hole and 60 feet from the other test hole (id. at 43). He stated that at the site where the damage occurred, the depth of the pipe was approximately 1 foot (id. at 33, 34). The Respondent claimed that it was the variation in pipe depth that resulted in the bulldozer damaging the gas pipe (id. at 45). Therefore, the Respondent asserted that he used reasonable precautions (id. at 47).

### III. Standard Of Review

G.L. c. 82, § 40 states in pertinent part:

After a company has designated the location of such pipes, mains wires and conduits at the locus of the excavation in accordance with the provisions of this section, the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking at the locus due to obliteration, destruction or other removal of such markings and the company shall then have twenty-four hours following the receipt of such request to remark such locus.

The Department has consistently found that excavators are responsible for maintaining utility designation markings. Linden Construction Company, D.P.U. 87-DS-149 (1991). The responsibility attaches after the utility companies have marked the location of their underground facilities at the excavation site named in the Dig-Safe request. Warner Bros., Inc., D.P.U. 87-DS-124 (1990). The Dig-Safe Law states that excavators must call for a remarking if markings are no longer visible or have been inadvertently moved. Lachance Excavating

Company, Inc., D.P.U. 87-DS-178 (1990). Even in circumstances where no damage occurs, the failure of an excavator to maintain markings is considered a violation of the Dig-Safe Law.

Warner Bros. Inc., *supra*.

G.L. c. 82, § 40 also states:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. *See Cairns & Sons, Inc.*, D.P.U. 89-DS-15 (1990); *Petricca Construction Company*, D.P.U. 88-DS-31 (1990); *John Mahoney Construction Co.*, D.P.U. 88-DS-45 (1990); *Northern Foundations, Inc.*, D.P.U. 87-DS-54 (1990). However in *Fed. Corp.*, hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. *Fed. Corp.*, D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from the duty to use reasonable precautions. *Fed Corp*, *supra*; *Amorello*, D.P.U. 89-DS-61 (1990). However, the depth of an

underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precautions, adequate support or evidence must accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

#### IV. Analysis and Findings

The issues to be determined in this case are whether the excavator failed to (1) maintain markings and call for a remarking, and (2) exercise reasonable precautions during excavation.

In addressing the first issue, the Division offered two underground damage reports indicating that the Dig-Safe markings were not visible. However, the Boston Gas employees who prepared the underground damage reports did not testify at the hearing. Mr. Miller, who was present throughout the excavation and at the time of the damage, refuted the Division's evidence by testifying that the markings were visible at the site of the damage. Therefore, it is unclear from the record whether the markings were visible or not. Adequate support or evidence must accompany any allegation against an excavator. Here, the Division has not met this burden.

Accordingly, the Department finds that the Respondent was not in violation of the Dig-Safe Law for a failure to maintain markings or call for a remarking.

In addressing whether the Respondent used reasonable precautions during excavation, the Division stated that if hand-digging had been used by the Respondent to locate the underground facilities, that the damage would not have occurred. The Respondent admits that a bulldozer caused the damage but claims that the test holes indicated that the pipe was deep enough to allow the bulldozer to pass over without risk of damage. The Respondent contends that the test holes support his claim that he used reasonable precaution and that it was variation in pipe depth that ultimately caused the damage.

Variances in the depth of underground utilities does not relieve excavators from the duty of using reasonable precaution during excavation. Fed. Corp., D.P.U. 91-DS-2 (1992). Although digging test holes may be considered a reasonable precaution when hand-digging to expose underground utilities is impossible, in this case hand-digging was possible. In fact, the damage occurred at a portion of the line that was covered with soil and grass. The Respondent did not produce any evidence demonstrating that it could not hand-dig in this area.

The Division adequately demonstrated that the Respondent failed to exercise reasonable precautions when the Respondent failed to hand-dig to locate the underground facilities prior to excavation. Accordingly, the Department finds that the Respondent failed to exercise reasonable precautions when excavating on July 29, 1992 on Andover Street at Cross Street, Peabody, Massachusetts, in violation of the Dig-Safe Law.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That D.W. White Construction, Incorporated, violated the Dig-Safe Law when it failed to exercise reasonable precautions while excavating on July 29, 1992 on Andover at Cross Street, Peabody, Massachusetts; and it is

ORDERED: That D.W. White Construction, Incorporated, being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,